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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC

HONORING TICKETS OF NATIONAL AIRLINES PURSUANT TO THE REQUIREMENTS OF SECTION 145 OF THE AVIATION AND TRANSPORTATION SECURITY ACT

NOTICE

On November 14, 2002, the Department of Transportation issued a notice providing guidance for airlines and the traveling public regarding the obligation of airlines under section 145 of the Aviation and Transportation Security Act, P.L. 107-71, 115 Stat. 645 (November 19, 2001) ("Act"), to transport passengers of airlines that have ceased operations due to insolvency or bankruptcy. That notice, issued after National Airlines' November 6, 2002, cessation of operations, followed a similar notice issued August 8, 2002, after Vanguard Airlines' July 2002 cessation of service. Both notices were intended to provide immediate guidance in response to numerous complaints from ticketed passengers and inquiries from airlines. In addition, the November 14 notice also requested comments from airlines and the traveling public about the cost to carriers of transporting passengers of carriers that had ceased operations. The purpose of this notice is to respond to those comments.

Section 145 requires, in essence, that airlines operating on the same route as an insolvent carrier that has ceased operations transport the ticketed passengers of the insolvent carrier "to the extent practicable." Our earlier notices mentioned several factors that we would look to in determining whether airlines were

complying with section 145.[1] We stated, among other things, our preliminary view that, at a minimum, section 145 requires that passengers holding valid confirmed tickets, whether paper or electronic, on an insolvent or bankrupt carrier be transported by other carriers who operate on the route for which the passenger is ticketed on a space-available basis, without significant additional charges.[2] We made clear in our guidance, however, that we did not believe that Congress intended to prohibit carriers from recovering from accommodated passengers the amounts associated with the actual cost of providing such transportation. We stated that we did not foresee that such costs would exceed $25.00, an amount that we made clear was an estimate of the magnitude of the additional direct costs carriers might incur in transporting affected passengers on a standby basis.[3]

In our November 14 notice, in response to informal concerns raised by several carriers that our $25.00 cost estimate is too low, we formally requested that any airline or person who believes that the Department's estimate of $25.00 is either insufficient, or is more than necessary to cover the direct costs of accommodating ticketed passengers on a space-available basis, contact the Department and provide written comments and cost evidence in support of that position. Our formal request for written comments was made after complaining carriers had failed to respond to our earlier, informal requests for such information, and after

[1] Failure by an airline to comply with section 145 may constitute an unfair and deceptive practice in violation of 49 U.S.C. § 41712.

[2] We further pointed out that, under section 145, passengers whose transportation has been interrupted have 60 days after the date of the service interruption to make alternative arrangements with an airline for that transportation.

[3] We pointed out that examples of such costs include the cost of rewriting tickets, providing additional onboard meals, and the incremental fuel cost attributable to transporting an additional passenger.

reports that consumers had been, at least initially, charged far in excess of $25.00 for transportation.[4]

Delta Airlines ("Delta"), American Airlines ("American"), America West Airlines ("America West"), and United Airlines ("United") filed comments in response to our request. Unfortunately, none of those carriers provided information responsive to our request or otherwise demonstrating costs in excess of $25.00 each way for space-available transportation. Instead, Delta and American chose to argue that the Department has no ratemaking authority, and the Department's suggestion that, for purposes of section 145, $25.00 each way is a reasonable estimate of the cost to a carrier of providing alternate, space-available transportation constitutes ratemaking.[5] They both further argue that, even if the Department had authority under section 145 to review the reasonableness of fees charged to accommodate another airline's passengers, the marketplace should dictate the amount of that charge. American argues that in a deregulated environment passengers should assume the risk in booking with a financially weak carrier and, according to American and Delta, an airline's "standard reticketing fee," which is charged to fare-paying passengers who, under terms of their contract of carriage with the airline, voluntarily change their travel plans, is what the marketplace dictates. The carriers further argue that charging passengers of another airline that has ceased operations under section 145 an amount less than that "standard reticketing fee" is unfair to their fare-paying passengers. American also asserts in its comments that we have not adequately

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[4] Long before formal comments were requested, Department staff had informally advised carriers that expressed concerns about this guidance that, to the extent they experienced and could document reasonable direct costs in excess of $25.00, they should be entitled to recover such costs under the statute. At that time, Department staff specifically requested each airline that had expressed concern to provide evidence demonstrating that its reasonable direct costs exceeded the estimated $25.00 amount. No airline provided any documentation in response to that informal request. A few airlines also expressed separate concerns about difficulties in verifying confirmed reservations of passengers holding electronic tickets, in which case a hard-copy ticket would not be available. Department staff suggested it would be appropriate to require such passengers to provide proof of payment and confirmation, such as receipts and printed itineraries.

[5] Both carriers have challenged the Department's efforts to provide guidance regarding Section 145 in the U.S. Court of Appeals for the District of Columbia. *See Delta Air Lines, Inc. and American Airlines, Inc. v. U.S. Department of Transportation*, Case No. 02-1309 (D.C. Cir. filed October 8, 2002).

addressed its concerns over establishing the validity of tickets, especially electronic tickets, of passengers seeking reaccommodation under section 145.

America West and United both assert that their respective costs for providing alternate transportation on a space-available basis exceed $25.00 each way. Neither airline, however, provided information in support of that assertion, as requested by the Department. According to America West, the costs associated with transporting passengers of an airline that has ceased operations involve consideration of delays, security and baggage screening, and fraud, and could vary by market, time of service, and season. Accordingly, the carrier states, it did not have sufficient time to document all such costs. It states that instead, it elected to assess such passengers the same fare it would charge employees for friends and family members, under its "buddy pass" system, which permits those persons to travel on a space-available basis.[6] United states that its "preliminary" review persuades it that its costs exceed $25.00 each way but, due a lack of time in the immediate aftermath of the Vanguard and National shutdowns for detailed cost analyses and in view of the small number of passengers involved, it elected as a matter of policy to charge affected passengers $25.00 each way. United states that, because it has chosen to abide by the suggested $25.00 amount, it does not wish to burden itself with providing cost information at this time. United points out, however, that a variety of factors may affect its costs in any future instance where section 145 comes into play, such as fuel costs, the number of passengers affected, and the itineraries

[6] We have reason to believe that such a system would result in charges far in excess of $25.00 each way. Soon after National ceased operations, America West orally advised a Department staff member posing as a National passenger that its charge for transportation from Las Vegas to Chicago and return would be $168.50. At that time, the walk-up fare for any passenger was $276. Upon further inquiry by the Department, America West stated that this system was no longer being used in connection with section 145 and that it was assessing National passengers a $25 charge each way for standby travel.

involved, such as domestic versus international travel. United states that it may, in some instances, impose a charge higher than $25.00 each way but adds that it will advise the Department before doing so.

We see no reason, based on the comments submitted, to change our guidance with respect to the implementation by carriers of the requirements of section 145. We find particularly unpersuasive Delta's and American's argument that we lack the authority to provide any guidance with respect to section 145, and that our actions are unlawful ratemaking. Equally unpersuasive is the carriers' argument that the so-called "marketplace" rate, i.e. whatever rate those carriers elect to charge, is what Congress intended in requiring carriers to accommodate displaced passengers "to the extent practicable."[7]

We are not, as suggested by Delta and American, setting rates. As we stated in our earlier notices, in requiring carriers to accommodate passengers of a failed carrier "to the extent practicable," it is reasonable to assume that Congress did not intend to prohibit carriers from recovering minimal amounts associated with the actual cost of providing alternate transportation.[8] Adoption of Delta's and American's "marketplace" charge argument would render section 145 meaningless. Prior to enactment of section 145, airlines were free to transport passengers of a carrier that had ceased operations on a standby or confirmed basis at whatever charge they deemed appropriate. If, as Delta and American suggest, Congress intended to permit carriers to continue to charge passengers of carriers that had ceased operations a so-called "marketplace" rate, i.e., whatever

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[7] Section 145 cannot be viewed in a vacuum. Congress enacted Section 145 in an effort, at least in part, to ensure some measure of relief to aviation consumers who might be adversely affected by the serious economic consequences on airlines resulting from the terrorist attacks on September 11, 2001. At the same time it imposed these new duties on airlines, it also provided them with compensation totaling billions of dollars.

[8] However, since section 145 is silent on the issue of whether any fees may be assessed for transporting passengers of a carrier that has ceased service on a route, another possible interpretation might be that Congress intended that carriers not charge passengers at all for carriage under section 145.

rate the carriers deem appropriate, then Congress need not have enacted section 145 in the first place.[9]

Furthermore, the carriers' argument that it is unfair to charge a section 145 passenger less than they charge their own passengers to be reticketed is inapposite. Some of American's and Delta's domestic passengers are assessed a "standard reticketing fee" under terms of their contract of carriage with the respective airline for the fare under which they were ticketed, but only after they have voluntarily changed their travel plans as provided in the contract of carriage. Such change fees are in large measure assessed not simply to recoup reticketing costs, but in order to differentiate one fare product from another, i.e., as a "penalty" to affect passengers' purchasing behavior. Indeed, some fare-paying passengers of American and Delta may change their travel plans at will and are not required to pay any "reticketing" fee at all.

We believe that the airlines' normal pricing practices provide powerful evidence that the carriers' domestic "standard reticketing fee" of $100 far exceeds any costs of providing that service.[10] Each day, tens of thousands of Delta and American passengers are charged less than $100 each way, including taxes, by those carriers for their air transportation. Indeed, statistics filed with the Department by Delta show that in the second quarter of 2002, more than 3 million of Delta's fare-paying passengers, about 36 percent, paid less than $100 each way to travel on the carrier.[11] Similarly, statistics filed with the Department by American show that, for the same period, more than 2.3 million passengers, about 28 percent, paid less than $100 each way to travel on the carrier. Thus, it appears that unless those two carriers are offering a large percentage of their seat

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[9] For this same reason, American's argument that Congress intended that passengers should assume the risk in booking with a financially weak carrier would, if adopted, necessarily render section 145 meaningless.
[10] We note that both American and Delta assess a "standard reticketing fee" of $150 for international travel.
[11] This information is based on Passenger Origin-Destination Survey data filed with the Department. Most passengers purchase tickets on a round trip basis.

inventory at prices below their cost, there is no relation between the "standard reticketing fee" and Delta's or American's cost to carry a passenger.[12]

American also asserts that we have not adequately addressed its concerns over establishing the validity of tickets, especially electronic tickets, of passengers seeking to be reaccommodated under section 145. We disagree. We continue to believe that, in the case of electronic tickets, it is reasonable for airlines to take steps to satisfy themselves of the *bona fides* of the ticketholder requesting alternate transportation. Our suggestion that it would be appropriate to require passengers to provide proof of payment and confirmation, such as receipts and printed itineraries, was not intended to be exclusive, but only an example of the types of steps that might be taken by a carrier to satisfy itself of the validity of a passenger's claim to transportation under section 145. We recognize that there may be instances in which, absent verification of the passenger's status by the failed carrier, an airline cannot confirm the validity of the passenger's claim to transportation under section 145. However, that fact does not require the conclusion that the only way in which to validate a passenger's status is through a paper ticket or access to the failed carrier's reservation system.

As we have made clear in our prior notices, we are sympathetic to carriers' concerns that they not suffer uncompensated additional expenses in transporting passengers pursuant to section 145. We are disappointed, however, that no carrier, particularly those raising the strongest objections about our prior notices, chose to provide us with any information on their direct costs of carrying passengers on a space-available basis pursuant to section 145.

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[12] In addition, the position asserted in the comments filed by Delta and American is inconsistent with information provided to us by those airlines during our reviews of competition issues. In those cases, and in court proceedings under the antitrust laws, airlines routinely contend that their incremental cost of carrying an additional passenger is minimal, being made up largely of Computer Reservations System or other booking fees, credit card fees, commissions, marketing fees, and minor costs for fuel and food. In fact, we have recently been advised by a Delta official that the variable cost of accepting an additional passenger is $25 or less.

Notwithstanding our public invitation to all affected parties, there is no evidence in any of the comments submitted to us indicating that our suggested charge of $25.00 each way to accommodate passengers under section 145 is unreasonable. As we informally made clear to every carrier that inquired at the outset, and as is plain from our November 14 notice requesting comments on the cost issue, we understand that costs may vary by carrier. We also agree with the commenters who suggested that the cost to a particular carrier of complying with section 145 may be affected by a variety of factors, including the number of passengers, the current fuel costs to carriers, and the markets and itineraries involved. We note that, consistent with our statutory responsibilities, including those under 49 U.S.C. § 41712, it is important in implementing section 145 to avoid uncertainty and unnecessary harm to the industry and the public. We therefore intend to continue to monitor this situation and work with all carriers informally to ensure that the Congressional intent of section 145 is effectuated in any given situation.

Questions regarding this notice may be addressed in writing to Dayton Lehman, Deputy Assistant General Counsel, Office of Aviation Enforcement and Proceedings, 400 7th St., S.W., Washington, D.C. 20590, or he may be contacted by telephone at (202) 366-9342.

By:

Read C. Van de Water
Assistant Secretary for
Aviation and International Affairs

Dated: January 23, 2003

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